

book seem to me to spring from the same single source. The author has all his life been in love with the notion of purpose and this passion, like any other, can both inspire and blind a man. I have tried to show how it has done both to the author. The inspiration is so considerable that I would not wish him to terminate his longstanding union with this *idée maîtresse*. But I wish that the high romance would settle down to some cooler form of regard. When this happens, the author's many readers will feel the drop in temperature; but they will be amply compensated by an increase in light.

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FEDERAL COURTS. By Charles Alan Wright.¹ St. Paul: West Publishing Co. 1963. Pp. xvi, 496, 138 (appendix). \$10.00.

This excellent little book covers a great deal of important ground in procedure and does so in a thoughtful and probing way. The first half of the book is concerned with problems of federal jurisdiction which the author seeks to consider, in acknowledged response to the scholarship of Professors Hart and Wechsler, "in terms of their effect on our system of federalism, rather than as purely technical exercises . . ." (p. ix).² Most of the second half treats the procedure in the federal district courts.³ The book ends with three rather short chapters (11, 12 & 13) on the appellate jurisdiction of the courts of appeals and the Supreme Court, and the original jurisdiction of the latter.

The plan of this book may sacrifice something of unity; it certainly calls for a shift of emphasis at midpoint. The peculiar problems of judicial administration injected by the federal nature of our system are not the same as those perennial problems which *any* procedural system (with a heritage of adversary proceeding and jury trial) must face. Nor do they involve altogether the same aims and values—at least the emphasis is quite different. The problems of federalism concern primarily the adjustment of competing claims of state and nation under our order of dual sovereignty; the perennial problems of procedure concern the claims of individuals to have their cases decided on the merits, and the adjustment between such claims and those of administrative efficiency and procedural fairness to the adversary. Problems of the latter type would exist under a unitary form of government—they do not spring from federalism. Perhaps this difference in the nature of the problems justifies treating federal jurisdiction in a separate law school course and concentrating on the perennial problems in the basic

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² The nine chapter headings in the first half of the book are: "The Federal Judicial System," "The Judicial Power of the United States," "Federal Question," "Diversity of Citizenship," "Jurisdictional Amount," "Removal Jurisdiction and Procedure," "Venue," "The Relations of State and Federal Courts," and "The Law Applied by the Federal Courts."

³ Chapter 10, entitled "Procedure in the District Courts," comprises about 40% of the text. Chapter 11, "The Appellate Jurisdiction of the Courts of Appeals," contains little that bears on the peculiar problems of federalism.

procedure course, as is the prevailing mode (although the division of subject matter among law school courses is not a very strong argument in favor of anything).

There are, however, connections between the first and second halves of Professor Wright's book that justify his plan. In dealing with the allocation of judicial business between two sets of courts it is surely relevant to know what kind of justice each of these sets dispenses. Beyond this, there is a close interrelation between many of the specific perennial problems and certain aspects of the federal nature of our government, and this book points up well some of these relationships. The limitations on state court jurisdiction, for instance, often frustrate state court attempts to do the kind of justice among individuals that the device of interpleader is designed to afford. The federal judicial system is uniquely able to do this kind of justice even when no federal questions are concerned (§ 74).⁴ There is also interplay between the problems of federalism and basic procedural problems in other fields of joinder of claims and parties (§§ 71-80), in the determination of who are indispensable parties (§ 70), and so on. Professor Wright has dealt well with these areas.

Many of the treatments of individual topics are of a very high order. Professor Wright is abreast of recent developments and recent thought by commentators and he has summarized and analyzed much of this with a neat clarity that is not at all superficial. Some of the parts that particularly appealed to me are his treatments of the arguments for and against diversity jurisdiction (§ 23), the law applied in the federal courts (*Erie* and all that) (§§ 54-60), discovery (§§ 81-90), and pleading (§§ 66-69). The section on discovery is very detailed for a book of this length, and deals admirably and quite specifically with the burning current problems (including, of course, work product, special necessity and good cause, and the disclosure of statements taken by others than the lawyer conducting the case). The section on pleading uses quite a different technique. It is scarcely detailed enough for the

⁴ The success of interpleader depends on bringing all claimants into a single action. But the decision in *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916), requires a court (in most cases) to get personal jurisdiction over a claimant before a binding adjudication of his claim may be had. When claimants live in different states there may well be no state court that can get jurisdiction over all of them since a state's process cannot run beyond its borders for this purpose. Federal process, on the other hand, may constitutionally be made to run to all parts of the country, and Congress has provided for this in the Federal Interpleader Act, 28 U.S.C. § 2361 (1958).

This solution of a general problem of procedure by resort to federal aspects of our system raises its own peculiar problems. One of these is the constitutional question of how far Congress may dilute the historic requirement of total diversity (and thus maximize the availability of federal interpleader). Another problem is more subtle. At present federal courts apply state conflict of laws rules in diversity cases. But since in interpleader a federal court can get jurisdiction over persons who could not be brought into the local state court, local conflict of laws rules and, consequently, local idiosyncrasies of substantive law, may now sometimes bind persons and apply to situations that could not possibly have been brought within their ambit without the aid of federal long-arm process. Something like this probably happened in *Griffin v. McCoach*, 313 U.S. 498 (1941). It is doubtful indeed whether such byproducts of our federal system are happy or necessary ones. These are the kinds of questions Professor Wright points out and probes (pp. 200-02, 280-81).

purposes either of a pleader or a student engaged in the pleading part of a basic procedure course; but it does depict the nature of the pleading problem and of the modern attempts to solve it with bold, sure strokes. And it contains the best analysis I have seen of the controversial — and much maligned — *Dioguardi* case⁵ (§ 68).

No book, I suppose, fails to disappoint a reviewer in some respect. Here my disappointments were few. I found them in the sections on jurisdiction to determine jurisdiction (§ 16), and on the pretrial conference (§ 91). The first may well come from differences of opinion. In his criticism of the *United Mine Workers*⁶ decision and his difficulty in distinguishing it from other cases,⁷ it seems to me that Professor Wright takes too little account of two things: (1) the notion that *res judicata* will not be applied to jurisdictional rulings when to do so would contravene a strong policy "against the court's acting beyond its jurisdiction";⁸ (2) the far more imperative nature of a court's need to maintain the *status quo* pending a determination that might be frustrated by the *status quo*'s disturbance, than of a court's need to see that documents are disclosed (under federal rule 34) before an appellate determination of the duty to make disclosure. The notion, it seems to me, adequately justifies a distinction between *United Mine Workers* and *In re Green*⁹ (as indeed a majority of the Court itself thought).¹⁰ The imperative need seems to me adequately to explain the difference between treating disobedience that threatens the *status quo*, and treating disobedience that carries no such threat, and also to be far more significant than the conceptual differences between "jurisdiction" and "error" out of which Professor Wright constructs an *a fortiori* argument the other way that ends up by puzzling its author.¹¹

My quarrel with the treatment of the pretrial conference stands on quite a different footing. Professor Wright does not reveal that this is one of the great new battlegrounds between the special and the general pleaders,¹² a fact of which our common mentor, Judge Charles Clark, was keenly aware.

⁵ *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

⁶ *United States v. United Mine Workers*, 330 U.S. 258 (1947).

⁷ *In re Green*, 369 U.S. 689 (1962); *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), *cert. denied*, 375 U.S. 985 (1964); *Hauger v. Chicago, R.I. & P. R.R.*, 216 F.2d 501 (7th Cir. 1954).

⁸ RESTATEMENT, JUDGMENTS § 10(2)(e) (1942). Professor Wright himself mentions this notion and quite properly, I think, explains the decision in *Kalb v. Feuerstein*, 308 U.S. 433 (1940), on the basis of it (p. 45).

⁹ 369 U.S. 689 (1962).

¹⁰ *Id.* at 692 n.1. Professor Wright does not say expressly that this distinction is a tenuous one, but I construe his text as intimating as much (pp. 46-47). If I am mistaken in this, my apologies.

¹¹ Professor Wright notes that the discovery cases "make no reference to the *United Mine Workers* decision and thus it is not clear why a party is permitted to take his chances on defying an order which he believes to be erroneous or an abuse of discretion, and not be punished for it if the appellate court agrees with his view, while he is not given the same privilege where he believes the court lacks jurisdiction" (p. 46). It is submitted that the significant distinction is not between error and jurisdiction in this context. If the court that *erroneously* ordered disclosure also, as an ancillary part of this erroneous order, forbade destruction of the document pending appellate determination, would not the forbidden destruction be punished no matter how the appellate determination went?

¹² See *Padovani v. Bruchhausen*, 293 F.2d 546, 549 (2d Cir. 1961) ("Not with-

I also wish that the chapter on appellate jurisdiction of the courts of appeals (ch. 11) contained a little more of the kind of thoughtful appraisal of the appellate process which Professor Wright himself has given us in a valuable article.¹³

These criticisms surely are minor ones. I heartily recommend Professor Wright's book to every student of federal procedure and federal jurisdiction. It will also serve well the judge or practitioner when he needs a critical summary treatment that pulls many things together, rather than a detailed book of reference.

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CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES. By F. B. MacKinnon.¹ Chicago: Aldine Publishing Co. 1964. Pp. 246. \$6.00.

This is a study, made under the auspices of the American Bar Foundation, of the contingent fee system as it has developed in the United States—its origins, characteristics, economic significance to the bar and to the public, and its relation to the ethical standards of the profession. According to the author, the contingent fee has become the dominant method in this country for financing legal services by persons seeking to assert pecuniary claims. As such, it merits close scrutiny, particularly in view of the fact that in other countries it is generally condemned. While Mr. MacKinnon expressly disclaims any intent to pass judgment on the system, he has undertaken to assemble a considerable amount of historical and statistical material concerning it, and to review most of the arguments that have been advanced as to its social desirability.

Strictly speaking, a contingent fee agreement is one that calls for payment of compensation for legal services only in the event of recovery of some amount for the client. The compensation to be paid is usually stated in terms of a percentage of the amount recovered; if nothing is recovered, no fee is paid. If a reasonable minimum fee is to be paid, win or lose, the agreement is not a contingent fee agreement even though a specified percentage of the recovery is to be paid in the event of success.

Contingent fee agreements are now sanctioned (although not necessarily in all types of cases) in every state except Maine. The latest state to fall in line is Massachusetts. Nevertheless, such agreements are still regarded with varying degrees of suspicion, not only by many laymen but also by some courts and members of the bar. Within the last thirty years, the Boston Bar Association, in one of its official canons,

out careful planning were the federal rules designed to eliminate the evils of special pleading, and they should not be brought back under the guise of pre-trial.”); See Clark, *To an Understanding Use of Pre-Trial*, 29 F.R.D. 454 (1961).

¹³ Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

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